

AUG 19 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Defendant.

CC Docket No. 93-161

APPEAL FROM INTERLOCUTORY ORDER OF THE PRESIDING JUDGE

1/ TMC's "Motion for Leave to Take Additional Depositions" was filed with the Common Carrier Bureau on January 29, 1993. That Motion requested permission to take depositions of five named individuals and demonstrated in detail that the need for those additional depositions had been revealed in testimony in predesignation depositions.

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discussions eventuated in TMC's counsel, on July 15, 1993, suggesting the week of August 9, 1993 to commence depositions. PacBell offered to make two witnesses available that week and one during the week of August 16, 1993. To avoid unnecessary travel expense, and a scheduling conflict that had arisen in the meantime, TMC counter-proposed the week of August 16, 1993, which was eventually agreed to by July 29, 1993. TMC then set about to file its Notices of Deposition announcing specific dates, times, and locations for the three agreed-upon depositions.

3. In the Orders under appeal, the Presiding Officer dismissed TMC's Notices of Deposition, and also TMC's subsequently filed Requests for Subpoenas.^{2/} The basis for dismissing the Notices and the subpoenas (in part) were that they were not filed with the Presiding Officer on July 26, 1993, in accordance with the Presiding Officer's after-the-fact interpretation of the quoted language appearing in Paragraph 10 of the PHO: "Such further discovery will be initiated on July 26, 1993, conducted pursuant to 47 CFR 1.311 through 1.340, and completed on or before September 17, 1993."^{3/}

^{2/} Of the original five deponents identified by TMC in its predesignation motion, one is out of the country. Another original deponent, C.L. Cox, resisted discovery, claiming that as he is no longer employed by PacBell, he did not have to participate. This necessitated, after substantial discussion and correspondence, the filing of a Request for Subpoena. TMC intended to depose Mr. Cox during the week of August 16, 1993, as well. The request for a subpoena of Mr. Cox was filed with the Presiding Officer on August 2, 1993, and denied by Order 93M-506 (rel. August 6, 1993). Additionally, TMC filed a fifth Notice of Deposition and requested a subpoena for Helga Post, a PacBell employee, in substitution for the employee no longer in the U.S. This request, filed August 4, 1993, and only after PacBell refused TMC's request that Post be made available voluntarily, also was dismissed by the Presiding Officer. Order 93M-511 (rel. August 9, 1993).

^{3/} While the denial of the subpoenas are based on slightly different grounds, they also stem from the overall narrow and arbitrary approach of the Presiding Officer, first evidenced in his dismissal of the deposition notices on August 5th. For example, the Presiding Officer objects
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4. TMC respectfully requests that the Presiding Officer's rulings be reversed, and that the depositions be allowed to be conducted as had already been agreed to by the parties and that subpoenas be issued for Mr. Cox and Ms. Post.

5. Having immediately instituted efforts to arrange for the scheduling of depositions after release of the PHO, and having diligently pursued those efforts, TMC acted in compliance with any reasonable interpretation of Paragraph 10 of the PHO. Moreover, TMC's filings on August 2, 1993, and its subsequent requests for subpoenas caused no prejudice to PacBell, placed no burden on the FCC's administrative processes, nor threatened delays in the resolution of this proceeding. To the contrary, were the intended discovery permitted, it would expedite the hearing.

6. Fundamentally, however, denying TMC the right to take these depositions will seriously hamper its ability to effectively prepare its direct case, and will negatively impact development and explication of the public interest concerns involved in TMC's complaint. Such factors have previously been found to deny a party a right to a fair hearing, particularly in the context of post-designation discovery in common carrier complaint proceedings.^{4/}

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to the lack of 21 days' notice in regard to the subpoena of Mr. Cox. In fact, Mr. Cox had more than 21 days' notice of TMC's intent to take his deposition. Similarly, Ms. Post had, at least through counsel, more than 21 days actual notice that her deposition was intended. In any event, the cure for a failure to provide 21 days' notice is rescheduling, not denial of needed discovery.

4/ Because the denial of discovery, under the circumstances, so unnecessarily and arbitrarily inhibits TMC's ability to prepare its direct case, a de novo hearing will be required if this appeal is deferred and appeal of these rulings is taken on exceptions to the initial decision. Moreover, because the rulings are based on an unreasonably limited interpretation of the language of the PHO, that is not supported by the Commission's Rules, precedents or basic logic, a novel
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7. What is legally wrong with the Presiding Officer's interlocutory rulings is that they are all essentially based on his personal definition of "tardiness," his personal animosity to attorneys he believes act "tardily" and allowing these personal views to shape and control the application of his PHO. His interpretation of the PHO's discovery requirements is neither apparent from the express language of the Order, nor mandated by the Commission's discovery rules, nor needed in practical effect to avoid prejudice to any party or to control the orderly conduct of the hearing.^{5/} On the other hand, the personal interpretation of the PHO's language on discovery denies TMC its fundamental right to a fair hearing before an impartial trier of fact. As such, the Presiding Officer's conduct constitutes a clear abuse of discretion which warrants reversal.

8. While the discretion of the presiding officer over discovery is never absolute, in a complaint against a common carrier, it is further circumscribed by the inherent public interest concerns that are involved. In Bunker-Ramo Corp. v. Western Union Telegraph Company, 32 FCC 2d 860, 26 RR 2d 164 (Rev. Bd. 1972), the Review Board remanded a complaint

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question of policy is presented. TMC, therefore, respectfully submits that the issues raised in the Presiding Officer's rulings are the proper subject to an appeal under the standards set forth in Section 1.301(b) of the Commission's Rules.

5/ The requests for subpoena of Mr. Cox was also faulted by the Presiding Officer for failure to file a notice to take deposition. The Presiding Officer either ignored or forgot he had already granted TMC's Motion to take Cox' deposition so that Rule 1.333(e), relied on by the Presiding Officer, is not applicable. Moreover, Cox was in no way prejudice for, if the subpoena had been issued without such a notice having been filed, a motion to quash could have been filed. See Rule 1.334.

proceeding to the Presiding Officer, requiring a de novo hearing, because of the abuses of the Presiding Officer's discretion regarding his rulings on discovery.

9. In Bunker-Ramo, the Presiding Officer denied the complainant's motion for discovery because of the Officer's interpretation that such discovery was not required since it had not been completed prior to the scheduled pre-hearing conference. The Review Board found that the Officer had misconstrued the purpose of the discovery rules and the scope of his discretion under those rules. Id. at 864. The Board, unable to find any basis for the Officer's interpretation of the rules, in the rules themselves or any FCC Order adopting those rules, held that the Officer's summary denial of the complainant's motion "arbitrarily prevented [the complainant] from obtaining the full and fair hearing contemplated by the Commission's designation Order, and a new trial was required." Id. at 865-866.

Respectfully submitted,

CLARK BADER, INC. d/b/a TMC LONG DISTANCE

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CERTIFICATE OF SERVICE

I, Suzanne Helein, hereby certify that on this 19th day of August, 1993, I caused a true and correct copy of the foregoing "Appeal from Interlocutory Order of the Presiding Judge" in CC Docket No. 93-161, File No. E-89-85, to be sent to the following in the manner indicated:

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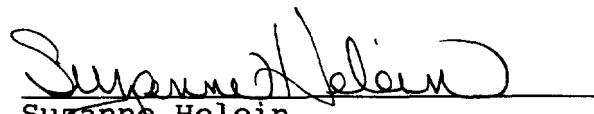
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